COMMITTEE ON RULES OF PROCEDURE
IN DOMESTIC RELATIONS CASES

Monday, December 12, 2003, 10:00 am – 3:00 pm
State Courts Building, Conference Room 119
1501 W. Washington, Phoenix, Arizona
Teleconference #: (602) 542-9007
Web Site: http://www.supreme.state.az.us/drrc/

Members Present:
Hon. Mark Armstrong, Chair
Hon. Norm Davis
Deborah Fine, Esq. (telephonic)
Bridget Humphrey, Esq.
Hon. Michael Jeanes
Phil Knox, Esq.
Hon. John Nelson
Richard Scholz, Esq.
Robert Schwartz, Esq.
Debra Tanner, Esq.
Hon. Nanette Warner (telephonic)

Member Represented by Proxy
Annette Everlove, Esq. (Dean Christoffel)

Members Not Present:
Annette T. Burns, Esq.
Annette Everlove, Esq.
Janet Metcalf, Esq.
Hon. Dale Nielson
Brian W. Yee, Ph.D.

Staff Present:
Konnie K. Young
Karen Kretschman
Isabel Gillett
Elizabeth Portillo

Quorum: Yes

1. Call to Order: Hon. Mark Armstrong

Judge Armstrong welcomed Committee members, and all present members introduced themselves. He asked the Committee to review the minutes from the last meeting on November 17, 2003.

Motion: Minutes Approved, Seconded
Vote: Minutes Approved

2. Reports from Workgroups and/or Workgroup Meetings

Judge Armstrong indicated that since Annette Burns is not present, we will postpone the report from Workgroup #3 until someone from her group can report.

a. Workgroup #1: Sections I & II (Bridget Humphrey, Chair)

Bridget Humphrey reported for Workgroup #1. Discussion ensued regarding Rule 5 and the issue of public access. Michael Jeanes said he took the rule request to the clerks' association meeting and they were not in favor of this rule; they thought it was just a Maricopa problem, and that it is a significant increase in workload for the clerks. Judge Armstrong said he believed it was not just an issue for Maricopa County because it was raised at this committee by Pima County representatives. Michael said that if this rule passes, it was his intent to implement it in a way that would be much different than the capabilities of the smaller counties. He would try to withdraw paper file access to the public, only provide access to the documents electronically, and program the system to count the 45 days after the Affidavit of Service is filed. He stated that the other clerks do not have that capability.

Judge Armstrong suggested one change in terms of draftsmanship with the phrase "the following rule" in 5(d). He suggested that it should be "this section of the rule" or "this paragraph of the rule."

There was some discussion, and the Committee agreed to make the following changes to Rule 5(d)(5):

5(d)(5) Public Access—REPLACE 1st and 2nd sentences.
By administrative order of the presiding judge, or local rule, a county may require that in all family law cases, all court documents, records and evidence shall be unavailable to the general public until the affidavit of service is filed, or 45 days have passed since the filing of the petition with the court, whichever occurs first.

Bridget then spoke about Rule 5.1(b), which is in regard to limited scope representation, subparagraph A – limited appearance. Bridget stated that she had failed to include the clause that "nothing in the rule shall limit an attorney's ability to provide limited services to a client outside of the court case" in her draft from last time, but had now included it.

There was some discussion regarding "outside the court case" or "pursuant to an appearance in the case."

The Committee agreed to make the following changes to Rule 5.1(b)(1):

> **5.1 (b)(1) Limited Appearance**
> **Strike "outside of the court case" and replace with: "without appearing of record in a judicial proceeding."**

Bridget Humphrey proposed additional changes in her memo, which was distributed to the Committee. She also stated that one of goals of the Committee is to simplify language, and we have not really done that at this stage. When we decide on content, we might want to address ideas for simplification.

Bridget has been keeping a list of terms and definitions. She stated that the terms previously distributed may be too simplistic for what we want to do and that they may be better as a handout for *pro per* litigants.

Bridget asked if we want to make the parties filing pleadings follow the traditional rules in terms of affirmative defenses, pleading fraud, pleading capacity, conditions precedent. She asked if they should be eliminated or if they should be included, because this had not been specifically discussed.

Judge Nelson thinks that the third-party rule should be eliminated, and fraud does not apply. Dean Christoffel stated that the third-party rule would apply. Bridgett stated that fraud could apply to elements of a case, but asked if we really want to require a Petitioner or Respondent to plead this, or if we want to simplify by eliminating these.

Judge Davis agrees; he thinks we need to simplify and clean up the pleadings. He said we need to think that through, because he thinks family law is a creature of statute. We ought to completely delete anything that does not deal with statutory defenses. Judge Armstrong agreed and said we need to put "simplification" on the agenda for future meetings.

Next, the Committee discussed Rule 7.

The Committee agreed to the following changes for Rule 7:

> **Rule 7. Pleadings**
> **Delete (a) since we are deleting (b)**
> **7(b)—Committee decides to delete it. (Demurer)**

Next the Committee discussed Rule 8. Judge Armstrong suggested that we could simplify 8(b) and (c). Judge Armstrong stated that as a practical matter, no matter what Plaintiff or Defendant has responded, we hear everything. Judge Davis suggested that the parties should write a paragraph or two as a response.

The Committee agreed to the following changes for Rule 8(d):

> **Rule 8(d). Effect of Response**
> **The filing of a Response has the effect of placing all matters pled at issue that are not specifically admitted in the Response.**

Discussion ensued regarding terminology of responsive pleading v. response and answer.

The Committee agreed to the following changes for Rule 8:

> **Rule 8(e)**
> **Leave 8(e)(1) as is, but eliminate the number 1, because the next sentence will be the first sentence of (2): "A party may set forth two or more statements of a claim or defense alternatively or hypothetically."**
>
> **Rule 8(g)**
> **The Committee agreed to DELETE Rule 8(g).**

Rule 9
Next, the Committee discussed Rule 9. Judge Armstrong said it can be simplified and asked that workgroup members work on it when they meet.

Judge Davis voiced his concern that we do not get the Family Law Rules so thin or so bare-boned that we eliminate matters they regularly get in family court.

Rule 9(g). Verification of the Answer
Judge Davis referred to an article written about the definition of verification. He stated that there is a lot of confusion about what verification is, but he thinks it is done for the following reasons:

1. To verify that the person who signed a document actually signed it.
2. To verify if service is done, and that the actual respondent accepts it and not just someone else using respondent's name.

Judge Davis suggested that each rule should either say notarized or not. Judge Armstrong said that the context is in Rule 80(i), which would be acceptable except in those three categories. He said Rule 80(i) is considered a catchall, and that it was important that we define for each particular pleading what the requirements are; then there should be no need for a catchall provision.

Judge Davis stated that we ought to have a discussion somewhere regarding what petitions should be required to be signed by a notary. Richard Scholz agreed that there is a need to tell what type of signature is required.

The notary process was discussed. One member raised a concern about document preparation places doing (notarizing) a pile of petitions at a time.

Judge Armstrong stated that if reliability is at issue, then notarizing a document seems most reliable. Another member suggested that the most reliable method is having the party sworn in and then signing the document.

Phil Knox raised the issue of protective orders and relying on 80(i) when a party had no identification. Someone else stated that confirming that a person who signs the document is, in fact, that person is very important. And another member stated that having a person raise his or her hand is not going to defer him/her from lying; people who falsify are going to do it regardless.

Judge Davis indicated that when there is a change in custody, like in an emergency custody situation, he is concerned that there has to be some penalty beyond perjury because a child could be taken, and this would be a serious matter.

Dean Christoffel said it is his understanding that acknowledgment is different than a sworn statement. Other things are perfunctory. For Waiver of Service, there is really a need to have it identified who that person is.

The purposes or reasons for verification were discussed, and the following questions were posed:

1) Is it important that the person be known?
2) Is it important that subject matter is true?
3) Is ensuring a document goes to right place needed?

Rule 11

Next, the Committee discussed Rule 11. Judge Armstrong stated that the Committee should come up with some rule that encompasses all different types of pleadings and states the type of required signature to verify that:

1) The person is the person. Although the person is supposed to have ID; if they do not, it still works.
2) The matter is true and correct, and this would require a higher level of authenticity. Judge Armstrong asked if we really want to go there.

Judge Armstrong said that we can include under every pleading the language of 80(i). But he thinks it should be that a person does appear, presents identification, and signs under penalty of perjury.

Phil Knox read the following language that he came up with after talking to two commissioners regarding problems that they face regarding 80(i): "On this (blank) day of (blank) before me personally appeared (blank) with the signer's name, whose identity was proved to me on the basis of satisfactory identification to be the person whose name is subscribed to this document and who acknowledges that he or she has signed the above document."

Judge Armstrong said he is in favor of going with acknowledgement when we need higher level of reliability. Judge Davis thinks acknowledgement is a lower level of reliability.

Judge Armstrong said that the benefit of using Rule 80(i) is that the party is signing that what is in the document is true and correct. Bridget stated that they (parties) are a little more careful when they have to sign to agree that something is true. Judge Davis stated that we could define verification in rule. Maybe we interpret verification to mean that it is subscribed and sworn or whatever we want to do. Judge Armstrong thinks we can do that as long as it is not contrary to a rule. This will go widespread distribution, so if there is a definition for verification out there, we will know it.

Judge Armstrong stated that Rule 80(i) is supposed to be a relaxation but still requires parties to say that they are signing under penalty of perjury, and they are certifying that the contents are true and correct. Judge Armstrong stated that he would like to see this for any pleading as the bottom line.

Judge Davis said that this would basically keep verification in place as it is and that the courts have all operated under this rule. Petitions can be done without a notary, just with the unsworn declaration. Judge Armstrong said we can add others later.

Bridget asked if Judge Armstrong envisioned putting types of documents in writing that require verification. Judge Armstrong said that we need to get one rule that consolidates this. He also stated that it is an important enough area that should be addressed early in the Rules.

Judge Davis suggested that we have three different options as we go through each rule:

1. Acknowledgment—simply that a notary says this person is the person;
2. Verification—signed before a notary and is sworn to truth, subject to perjury—notarized; plus perjury penalty, and
3. Catchall.

The question was asked how do we know when it is an acknowledgement or verification? Judge Davis said because of what the notary says. It was suggested that the notaries have standard ways they acknowledge signatures, and they will never differentiate between one and two, merely because we have defined it in our statutes.

It was suggested that with Rule 80(i), when a pleading is signed, it is always under penalty of perjury, and that rule applies no matter what document is being signed. Judge Armstrong said that does not require anything from the notary. It requires the person executing the pleading to include that language. He would like to see it more simplified – that for the vast majority of cases they can use the 80(i) language, and for the special cases, they are going to use the 80(i) cases, plus have the person sign in front of a notary. He stated that this seems to be the consensus that we have.

Dean stated that notaries are tightening up. Judge Armstrong thinks it is cyclical, but based on that, for vast majority, use 80(i) and for others *jure* act which assures that it is signed under oath and notarized.

TASK: Judge Davis's workgroup is going to work on the 80(i) issue. A definition section is needed. Verification needs to be defined.

TASK: Judge Armstrong said that the groups need to keep a running list of definitions. Konnie will compile them.

b. Workgroup #2: Section XI (Judge Davis, Chair)

Next, Judge Davis's Workgroup presented their progress. They first discussed alternative Rules of Evidence. Some proposals regarding the implementation of rules of evidence into rules of family law were made:

1. Treat evidence as a general exception; if it is relevant and reliable evidence, it could be used unless someone files a motion to require strict application of the Rules of Evidence;
2. Follow the standard from Title 41 (Administrative Agency standard, which is much relaxed)
3. Combination of one and two;
4. Traditionally reliable documents should be admitted without custodians with three criteria:
    1. Appear to be complete and accurate;
    2. Are supported by testimony that demonstrates reliability, and
    3. Discloses 60 days prior to its admission.

Judge Davis said if we are going to discuss Rules of Evidence that we select one of these options.

Judge Armstrong suggested that the Committee include two alternatives and exclude a couple of the alternatives. He suggested that we include sections 3 and 4, except for the 60 days requirement. Judge Davis said that *pro se* litigants will not comply with it in any event. Judge Armstrong believes it should be 30 days or as otherwise authorized by the court. The problem is with emergency hearings— they are not going to have evidence until it is on the spot.

The Committee agreed upon the following changes to the rule entitled Applicability of Rules of Evidence:

> **<u>Rule . Applicability of Rules of Evidence</u>**
> **DELETE options 1 & 2.**
> **Include options 3 & 4 with change.**
> **Language for change to 2nd option: ". . . is reasonably disclosed and provided to the adverse party."**

Dean Christoffel asked about the meaning of "good cause" language.

Judge Armstrong said that we did discuss two options. Judge Armstrong is not opposed to using automatic opt in with this rule, because there is still 60-day requirement. Judge Davis thinks it is for discussion, and he would like to see the Bar provide other options. Discussion ensued regarding relaxing the Rules of Evidence—we did have a consensus with option three when we allowed the automatic opt into the Rules of Evidence if they chose to do so.

Judge Armstrong stated that this opens discussion wider if we include "good cause" because if that is taken out, no one will think about it. Judge Davis said part of intent was for allowing everyone to know what is going to be introduced at trial, so rules are not used as a shield.

Judge Armstrong said there was always the requirement of reliability with respect to hearsay. Safeguards are built in – they are just simplified.

Rule . Consolidation
Consolidation is a compilation of what the civil rule provides, except that it adds a consolidation where there is a common child or common parties in addition to common question allowed or facts.

Next the Committee discussed the rule on Separate Trials. Judge Davis said that Judge Warner had indicated that we have to allow for this. He said it is something they typically do in Pima County. We might inadvertently encourage people to request separate trials.

The Committee agreed to eliminate the Separate Trials rule:

> **Rule . Separate Trials**
> **ELIMINATED**

Next the Committee discussed the Change of Judge rule, and the Committee agreed to the following:

> **Rule . Change of Judge.**
> **Bring 42(f) into the family law rules in its entirety.**

Next, discussion ensued regarding Protected and Unpublished Addresses.

Rule . Protected and Unpublished Addresses.
This is an effort to protect unpublished addresses. Judge Davis will work on this in his workgroup. Michael Jeanes stated that typically litigants come in and say yes I want my address protected. But without giving legal advice, the clerk's office takes this seriously and they attempt to explain what it means. This rule is critical.

TASK: Michael agreed to work with Judge Davis on this to shorten it.

The Committee agreed to the following changes regarding the rule on Public Access to Proceedings:

> **Rule . Public access to proceedings**
> **Delete first paragraph and Note.**

Discussion then turned to the rule regarding Notice of Appearance. Judge Davis stated that he thinks we should delete it since it is in statute (25-407).

The Committee agreed to eliminate the Notice of Appearance rule:

> **Rule 5.1. Notice of Appearance**
> **Eliminate this rule.**

LUNCH

(Workgroup Reports continued)

c. Workgroup #3: Section III (Richard Scholz for Annette Burns, Chair)

Richard Scholz reported this workgroup's progress, and discussion ensued regarding Rule 54.

Following is the status of Rule 54:

54(h)—Consent Decree (Eve Parks is revising this)

54(a)—Special master of the court – Currently states that "a judgment shall not contain a recital of pleadings of a master or the record of prior proceedings." His group proposes that it now say "but may contain findings by a special master appointed by the court."

54(c)—Demand for judgment - now "A judgment by default shall not be different in kind from or exceed the amount prayed for in a demand for judgment except as to a party whose judgment was entered by default. Every file judgment shall grant the relief to the party whose favor it is rendered is entitled consistent with the best interest with the children."

3. Formation of New Workgroups

Judge Armstrong determined the next three sections of the outline, on which the Committee would next focus. Members volunteered and were appointed to workgroups, and members who are not members of the Committee were added, as well. Following is the list of workgroup sections and members:

IV. Emergency & Temporary Orders
CHAIR: Judge Davis
Helen Davis
Annette Everlove
Michael Jeanes
Bridget Humphrey
Dean Christoffel

V. Disclosure & Discovery
CHAIR: Judge Nelson
Janet Metcalf
Richard Scholz
Deborah Fine
Judge Nielson
Robert Schwartz

VI. Settlement & Pretrial Resolution of Cases
CHAIR: Judge Warner
Brian Yee
Annette Burns
Nancy Eades
Clarence Cramer
Phil Knox
Debra Tanner
Judge Davis
Kathy McCormick

4. Next Meeting: Konnie Young

The next meeting will be held on January 16, 2004, at the Arizona Courts Building, 1501 W. Washington, Conference Room 119 from 10:00 am – 3:00 pm.

5. Call to the Public

There were no public members in attendance.

6 . Adjournment: Judge Armstrong

Judge Armstrong adjourned the meeting at 2:00 pm, and some workgroup members continued their discussions and work after the adjournment and until 3:00 pm.